

JUDICIAL REVIEW AND FUNDAMENTAL FREEDOMS IN ANGLOPHONIC INDEPENDENT AFRICA

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The governments of independent Africa took office under constitutions in the main designed by departing colonial civil servants and imposed as a condition for independence.¹ The Colonial Service, of course, was authoritarian to the core.² It distrusted politicians generally—it had been singularly free of political control throughout the imperial era. It profoundly distrusted the new African politicians who were about to take over direction of their own countries.

To control the new men, the Colonial Service put great reliance upon the paraphernalia of eighteenth century constitutional theory. Free elections lay at the core. To make these elections possible, the democratic liberties that the Service had itself so long suppressed were suddenly perceived as essential: free press and speech; freedom of religion; freedom of association; and freedom from discrimination, unlawful searches and seizures, arbitrary arrest and imprisonment. Only an informed, understanding and unintimidated electorate can intelligently choose governors who will implement a program truly in its interests.

The whole system basically failed in Africa. Governments, by and large, did not make choices favorable to the interests of the masses. Stagnation, not development, was the theme of the Sixties.

The failure resulted in part from the weaknesses of the courts in protecting fundamental freedoms. But that weakness alone is plainly an insufficient explanation for the failure of the Development Decade. What Africa needed most was an accelerator, not a brake on government activity. In any event, the eighteenth century model was, for twentieth century Africa, an absurd dream. Noticeable mainly by their absence were the conditions for democracy's success—a literate, educated and informed populace; traditions of mass involvement in governmental affairs; and political parties who compete for votes on the basis of principle and program. That these desiderata have ever been present to ensure the

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¹ Seidman, *Constitutions in Anglophonic Sub Sahara Africa: Form and Legitimacy*, 1969 WIS. L. REV. 84, 94.

² Seidman, *Administrative Law and Legitimacy in Anglophonic Africa: A Problem in Reception in Foreign Law*, 5 LAW AND SOC. REV. 161 (1970).

golden promises of democracy anywhere may well be doubted. Elite theory has always argued that they were illusory.³

To doubt the centrality of fundamental freedoms to African political processes, however, is not to say that those freedoms are unimportant in the African context. Freedom of expression is indispensable to any government seeking to change social institutions. It is a useful component of the processes by which government learns the consequences of its own policies, probably the most important single element in rational decision-making. It is important if government is to have the advantage of new ideas, which the bureaucracy and the party are frequently structurally incapable of generating. It may be helpful to government in learning the claims and demands of the populace at large.

The protection of fundamental freedoms in those African constitutions which included them was entrusted to the legal order.⁴ That protection rested upon two bases. In the first place, the judges and prosecutors upon whom the system depended for effectiveness had to be independent. In the second place, the decision-making system—that is, the appellate courts—had to be likely to produce decisions favorable to claims of freedom as against government efforts to restrict them. Each of these areas in turn will be examined.

I. THE DIRECTOR OF PUBLIC PROSECUTIONS

In common law jurisdictions, prosecutors have probably the broadest discretion lodged with any public official.⁵ A Maryland court stated the accepted position:

As a general rule, whether the State's Attorney does or does not institute a particular prosecution is a matter which rests in his discretion. Unless the discretion is grossly abused or such duty compelled by statute or there is a clear showing that such duty exists, mandamus will not lie.⁶

In Britain, the Director of Public Prosecutions [D.P.P.] has an equally broad discretion.⁷ The classical wisdom perceives only the danger of political influence on discretion. Wherever there is broad discretion, the potential for corruption and influence is equally broad. The use of the law against political malefactors, however, depends upon the autonomy of the legal order, and particularly the criminal justice system. The

³ See generally G. PARRY, *POLITICAL ELITES* (1969); T. BOTTOMORE, *ELITES AND SOCIETY* (1964).

⁴ Ghana, Tanzania, and Malawi did not include specific human rights provisions in their independence constitutions.

⁵ K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 188 *et seq.* (1969).

⁶ *Brack v. Wells*, 184 Md. 86, 90, 40 A.2d 319, 321 (1944).

⁷ R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND*, 136-40 (5th ed. 1967).

D.P.P. in any case can exercise his power to enforce the law only if he is free of political pressures and in cases against high officials and politicians, only if he is as autonomous in his position as human ingenuity can devise. Only so, it is argued, can there be assurance that government itself is under law. In the United States, the difference in vigor in prosecuting political malefactors between the regular Justice Department officials and the Special Prosecutors in the Watergate crimes is ample evidence that the high ideals of political independence of the prosecutors is not ordinarily achieved here at home. It was not achieved in Africa either, despite paper constitutional guarantees.

In the Zambia Independence Constitution, for example, the D.P.P. was specifically made a constitutional officer. He was given the unlimited power to institute criminal proceedings against any person, in any court (except a court-martial) "in which he considers it desirable to do so." Moreover, these broad powers in the D.P.P. "shall be vested in him to the exclusion of any other person or authority."⁸

He was to exercise these powers free from "the direction and control of any other person or authority,"⁹ (save judicial),¹⁰ except that in any case which seemed to the D.P.P. to involve "general considerations of public policy" he was to bring the case to the attention of the Attorney-General and abide by his directions.¹¹ In giving such directions to the D.P.P., the Attorney-General in turn was declared to be free from the direction or control of any other person or authority¹² save judicial authority.¹³

The office of D.P.P. was declared to be a public office.¹⁴ The appointment and removal of its occupant lay within the purview not of political authorities, but of the independent Public Service Commission.¹⁵ The Constitution provided for tenure for the D.P.P., equivalent to that of a judge, who could be removed from office only on reaching the age of sixty, or "for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour."¹⁶ Even then the question of removal of the D.P.P. had to be tried before a special tribunal consisting of the three persons who had all

⁸ Zambia: THE INDEPENDENCE CONSTITUTION, art. 53(4) (1964).

⁹ *Id.*, art. 53(b).

¹⁰ *Id.*, art. 125(10).

¹¹ *Id.*, art. 53(b).

¹² *Id.*, art. 52(4).

¹³ *Id.*, art. 125(10).

¹⁴ *Id.*, art. 53(1).

¹⁵ *Id.*, art. 114(3).

¹⁶ *Id.*, art. 118(2).

held high judicial office—under Zambian conditions at independence, three non-Africans.¹⁷

Similar constitutional provisions are liberally sprinkled in all the African independence constitutions, except in those of Ghana (1960), Uganda (1966), and Malawi. Many survived into the republican constitutions. The widespread corruption revealed by Commissions of Inquiry, frequently on the highest levels, and the equally widespread absence of criminal charges brought against high-level civil servants or Ministers (at least until after a coup which accomplished their downfall) shows that the institution did not work entirely as anticipated.¹⁸ Despite evidence of the massive violation of election laws in Nigeria in the 1964 election,¹⁹ the D.P.P. did not once institute a prosecution. Despite overwhelming evidence of the abuse of preventive detention in Ghana by low-level officials,²⁰ no prosecution was ever instituted. Allegations of torture of political prisoners by the police in Ghana, Uganda, Kenya and Zambia²¹ have never been investigated, let alone prosecuted. In no country has the independent D.P.P. served his full anticipated constitutional function.

The independent D.P.P. did not fulfill the role expectations implied in his independent constitutional status because formal legal independence from control by superior authority does not of itself cut the official role-occupant from society. Whatever the formal declarations about their freedom from control, judges and prosecutors exist in society. They are subject to all the controls imposed by society. Prosecutors want to become judges, or perhaps ministers. To expect them to prosecute the very politicians to whose favor they owe their original preferment, and to whom they look for further advancement, is to expect the impossible.

II. THE INDEPENDENT JUDICIARY

The ultimate expression of an autonomous legal system is a judiciary so removed from government that it can sit in judgment upon govern-

¹⁷ With the appointment of three Zambians to high judicial office in 1970-72, this has now changed.

¹⁸ See generally, R. WRAITH & E. SIMPKINS, *CORRUPTION IN DEVELOPING COUNTRIES* (1963); Nye, *Corruption and Political Development*, 61 AM. POL. SCI. REV. 417 (1967); NIGERIA TRIBUNAL TO INQUIRE INTO ALLEGATIONS OF IMPROPER CONDUCT BY THE PREMIER OF THE EASTERN REGION: REPORT OF THE COMMISSION OF INQUIRY IN THE AFFAIRS OF THE GRANTING OF IMPORT LICENSES (1966).

¹⁹ See Vickers, *Background to Breakdown in Nigeria: The Federal Elections of 1964-65*, 7 AFR. Q. 106 (1967); Rake, *Nigeria After the Elections: What Happened*, 12 AFR. TODAY 5 (1965); Anglin, *Brinkmanship in Nigeria. The Federal Elections of 1964-65*, 20 INT'L J. 172 (1965). The author personally observed many of these violations.

²⁰ Asante, *Law and Society in Ghana*, 1966 WIS. L. REV. 1113, 1115; see also, *Africa and the Law* (T. W. Hutchinson ed. 1968), Harvey, *Post Nkrumah Ghana: The Legal Profile of a Coup*, 1966 WIS. L. REV. 1096, 1103-07.

²¹ *Id.*

ment itself. The independence constitutions sought to institutionalize this discontinuity by the device of an independent judiciary.

During all but the last years of the colonial regime, the judges did not have judicial independence. They held office at the pleasure of the Crown.²² In England, by contrast, a judge could only be removed for misconduct, brought before both Houses of Parliament by a petition for his removal.

When the independence African Constitutions created judicial independence, they went far beyond the colonial position, and even beyond the English system. In Uganda, for example, puisne judges could be appointed only on the recommendation of an independent Judicial Service Commission with constitutional standing. A judge could only be removed for inability to perform the functions of his office, or for misbehavior, proven first at a hearing before an investigating judicial tribunal, and again before the Privy Council.²³ Analogous provisions obtained in the earlier independence constitutions,²⁴ although in the later ones the appeal to the Privy Council was omitted.²⁵

Appointment to these Judicial Service Commissions was largely limited to persons holding or having held judicial office. Typically, as in Zambia, the Chief Justice was the Chairman.²⁶ The Judicial Service Commission was expressly stated to be subject to the control or direction of no other person or authority.²⁷ A commissioner, once appointed for a term of three or four years (it varied in the several constitutions) could be removed by the President but only for inability to discharge the functions of his office, or for misbehavior.²⁸

The judges given such awesome independence were for the most part British, and even when they were Africans, they were either products of the British Colonial Judicial Service, or else British-trained. (The first entirely African-trained lawyers were admitted to the bar in Ghana in 1962). Not only the judges, but the Judicial Service Commissions which were supposed to appoint and discipline them, were inevitably drawn

²² *Terrell v. Sec'y of State for the Colonies*, 2 Q. B. 482 (1953). Despite the absence of formal guarantees of judicial independence, the colonial regulations provided that any proposal to dismiss a judge had to be referred to the judicial committee of the Privy Council.

²³ Uganda: THE INDEPENDENCE CONSTITUTION, art. 92 (1962).

²⁴ See Nigeria: THE INDEPENDENCE CONSTITUTION, arts. 106, 117; Sierra Leone: (CONSTITUTION) ORDER-IN-COUNCIL, 2d Schedule; Ghana: THE INDEPENDENCE CONSTITUTION, art. 41(3); see generally T. ELIAS, THE BRITISH COMMONWEALTH, THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION, Vol. 10 GHANA AND SIERRA LEONE 136 (1962).

²⁵ Kenya: THE INDEPENDENCE CONSTITUTION, art. 173; Malawi: THE INDEPENDENCE CONSTITUTION, art. 77; Zambia, THE INDEPENDENCE CONSTITUTION, art. 100.

²⁶ Zambia, THE INDEPENDENCE CONSTITUTION, art. 104(1a) (1964).

²⁷ *Id.*, art. 104(4).

²⁸ *Id.*, art. 104(2c).

from the roster of the former Colonial Judicial Service—in East and Central Africa exclusively white and all but invariably British or South African, and in West Africa sometimes Africans who had long been part of the same Service.

These elaborate provisions for a formally independent judiciary have been largely maintained since independence. There have been variations: in Ghana (1960) appointment was by the President,²⁹ in Tanzania, by the President after consultation with the Chief Justice,³⁰ in Malawi, by the President after consultation with the judicial service commission,³¹ in Nigeria, by the Prime Minister.³² Procedures for removal of judges have remained unchanged, save in Ghana and Malawi.³³ In Ghana, President Nkrumah was given power to remove a judge at will.³⁴ In Malawi, a proceeding before an independent tribunal has been changed in favor of an address by the National Assembly.³⁵ The term of judicial appointment remains as it was in the independence constitutions, to retirement age for indigenous judges, and on contract subject to six months notice of termination for expatriate judges. (The six month termination provision has never been invoked in Africa.)³⁶

In fact, there has been remarkably little overt tampering with the judicial process by political leaders. Professor Nwabueze, after an exhaustive review, concludes that "with but a few aberrations, the affirmation of faith in the independence of the judiciary by Commonwealth African presidents has been matched by their action. Except in Ghana under Nkrumah, there has been no attempt to employ the courts as an instrument in the power struggle. Nor has the colonial conception of the courts as a machinery for the enforcement of policy, based upon 'an overriding necessity for the preservation of good government,' been continued."³⁷

In constitutional cases, at least, there has been precious little need to intervene. The judges in Africa have been supine in their posture toward laws challenged on constitutional grounds. It is to that phenomenon that we now turn.

²⁹ Ghana, THE REPUBLICAN CONSTITUTION, art. 44(1) (1960).

³⁰ Tanzania: THE INTERIM CONSTITUTION, art. 57(2) (1965).

³¹ *Malawi: Proposals for a Republican Constitution* 12 (1966).

³² Nigeria: THE REPUBLICAN CONSTITUTION art. 112(1) (1962).

³³ B. NWABUEZE, PARLIAMENTARY AND PRESIDENTIAL CONSTITUTIONS IN AFRICA (forthcoming 1975).

³⁴ Ghana: THE REPUBLICAN CONSTITUTION, art. 45(3), (as amended by the Constitution Amendment Act, 1964, s. 6).

³⁵ Malawi, *supra* note 31.

³⁶ Nwabueze, *supra* note 33.

³⁷ *Id.*

III. THE JUDICIAL REVIEW OF LEGISLATION

In Britain, the doctrine of parliamentary supremacy combined with an unwritten constitution has meant that the judiciary has had, in theory, no role in reviewing the validity of legislation. Transported to Africa in written form, however, the Westminster model implies a very different notion of judicial review. Under a written constitution, parliament no longer is supreme. The constitution pre-empts that position. Since in the nature of things legislation ordinarily precedes adjudication, the judiciary comes to pass upon the validity of legislation after parliament has acted. Their role impresses final authority upon the courts. After enactment, any challenge to the law on constitutional grounds must fall for decision before the courts, for there is in African countries no other institution before which such a challenge could easily be mounted. (Constitutional courts exist in West Germany, Italy, and a few other countries.)

The critical challenges which search the reality of judicial independence are those which assert that the legislature has enacted a statute which violates a direct command of the constitution designed to protect the openness of the political process. These guarantees are typically contained in the "fundamental human rights" provisions of African constitutions. These purport to embody protections of free speech and press, of freedom from arbitrary arrest, against unreasonable search and seizure, and the like.³⁸ Historically, these rights were forged in the political process. Their origins without exception can be traced back to political trials. A challenge to a law purportedly violating one of them invariably challenges government at its most sensitive point, its own perception of its ability to maintain itself in power. Judicial response to such challenges is a test of the reality of judicial autonomy from government.

Judicial review of legislation arises in two alternative contexts. In one, the claim is that the action of the administration is within the scope of a particular statute, but that the statute on its face or as it has been construed is unconstitutional. In the other, the claim is that while the statute under which action is claimed to be taken may not in most cases permit unconstitutional activity, in this case the particular action taken was *ultra vires* the statute or constitution. Only the first of these embodies judicial control over lawmakers; in the second case, the judiciary purports to control the executive branch. Here we discuss only judicial control over the lawmakers, and hence limit our discussion to constitutional review of statutes on their face or as construed. We further limit our discussion to cases involving the fundamental freedoms.

³⁸ Zambia, THE INDEPENDENCE CONSTITUTION, chap. III (1964).

A. JUDICIAL RESPONSE TO CLAIMS OF UNCONSTITUTIONALITY

The judicial response in Africa to claims that fundamental freedoms have been violated, in cases where there was any real choice within the constitutional language, has been almost without exception in favor of governmental action and against the claim of freedom. Only where the constitutional language permitted no choice have the judges found in favor of the claim for freedom. Where the claims have involved individual property rights, courts have usually found against governmental action. In order to understand their pattern of decision, it is necessary first to examine the constitutional language defining the various fundamental human rights provisions.

1. The Constitutional Provisions

The fundamental rights provisions of the African constitutions find their prototype in the Nigerian Constitution of 1960.³⁹ They cover a wide range of the traditional human freedoms: the right to life and to personal liberty, freedom from slavery and forced labor, freedom from inhuman treatment, protection from searches and seizures, guarantees of procedural due process in criminal trials, freedom of conscience, freedom of expression, freedom of assembly and association, freedom of movement, and protection against discrimination on grounds of race, tribe, and so forth.

The scope of some of these rights is defined in language that admits of no exceptions. For example, the *Zambian Constitution* provides that, "No person shall be held in slavery or servitude."⁴⁰ A court called upon to construe such an unqualified provision is, of course, required to determine whether the particular state of affairs at issue is subsumed by the words "slavery" or "servitude," and the court has some scope for discretion in defining these words.

That discretion is, however, very narrow compared to the scope admitted under most of the provisions. The majority of the human rights provisions in the African constitutions contain derogation clauses. The right is first protected in broad terms. A succeeding section then derogates from it by defining circumstances in which that right may be denied. For example, although the above mentioned *Zambian Constitution* first provides that, "No person shall be required to perform forced labour,"⁴¹ the succeeding section immediately takes away part of what has

³⁹ T. FRANCK, *COMPARATIVE CONSTITUTIONAL PROCESS* 6 (1968).

⁴⁰ *Zambia: THE INDEPENDENCE CONSTITUTION*, art. 16(1) (1964).

⁴¹ *Id.*, art. 16(2).

been granted. This second section provides that for the purposes of the provision, the expression 'forced labour' does not include five situations: labor required by the sentence of a court; labor required by a person lawfully detained that is "reasonably necessary" in the interests of hygiene or the maintenance of the place of detention; labor required of a member of a "disciplined force" in pursuance of his duties as such; labor required during time of war or other emergency; and "any labour reasonably required as part of reasonable and normal communal or other civic obligations."⁴² Self-evidently, the scope of judicial discretion in construing the term "forced labour" is far greater than with respect to the words "slavery" or "servitude."

The derogation clauses reach their maximum ambiguity with respect to freedoms from deprivation of property and from unlawful searches and seizures, freedom of conscience, freedom of expression, and freedom from discrimination. The freedom of expression provision in the *Zambian Constitution*, for example, begins with a grand declaration:

22(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference . . . and freedom from interference with his correspondence.

That broad grant is immediately cut down:

22(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention to this section to the extent that the law in question makes provision—;

(a) that is reasonably required in the interests of defense, public safety, public order, public morality or public health . . . and except so far as that provision or, as may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.⁴³

Since any law restricting freedom of expression can easily be hung on one of the hooks of "public safety, public order, public morality or public health," the critical issue will always be whether it is not "reasonably justifiable in a democratic society." This last phrase appears as a leit-motif in the five categories of human freedoms earlier mentioned.

2. Judicial Response to Constitutional Challenges

Relatively few cases in Africa have tested the scope of these various provisions. In general, when the scope for discretion for a court has been relatively limited, courts have held statutes plainly violating the con-

⁴² *Id.*, art. 16(3).

⁴³ *Id.*, art. 22(1) and (2).

stitutional language to be void. For example, in *Ubingira v. Uganda*,⁴⁴ petitioners were detained under a deportation ordinance.⁴⁵ That ordinance permitted a minister to deport particular persons from one part of Uganda to another. Article 28(1) of the Constitution prohibited restraints on freedom of movement within Uganda, unless the statute imposing the restraint restricted "the freedom of movement or residence within Uganda of persons generally or any class of persons. . . ."⁴⁶ The court had no difficulty in finding that the petitioners were not a "class of persons" and that the statute was therefore unconstitutional.

In Kenya, a statute permitted collective punishment of a tribe or sub-tribe for stock theft, upon a finding by a magistrate that its members were "reasonably suspected to be guilty of the theft, or of receiving or retaining, any of the stolen stock, or of being accessories after the fact to such theft, receiving or retaining."⁴⁷ Pursuant to that statute, a magistrate imposed a collective punishment on some nine hundred Kikuyu for a raid on some neighboring Masai, supported by warrants of distress. The Supreme Court reversed. Article 19 of the Constitution forbade the compulsory taking of property without compensation, except (*inter alia*) "in the execution of judgements or orders of a court in proceedings for the determination of civil rights and obligations" (emphasis supplied). The Supreme Court denied that a magistrate acting in his discretion to impose collective punishment without hearing each accused was a "court" for the purposes of section 19.⁴⁸

Cases involving the very broad derogation clauses, purporting to define fundamental freedoms in terms of what is "reasonably required in a democratic society" have been on the other hand almost uniformly decided against the claims of freedom. In *Obi v. D.P.P.*,⁴⁹ for example, the accused, a member of the House of Representatives and leader of a small splinter party, was charged with sedition. He had distributed a pamphlet with the title, "The people: Facts that you must know." It alleged that the ministers were motivated by self-interest and not by the interest of the people at large. The issue of the constitutionality of the sedition statute was referred to the Supreme Court to determine whether the sedition statute could stand consistently with the constitutional guarantees. The sedition statute was identical with that obtaining during the colonial era. It provided that the crime of sedition was committed if a

⁴⁴ [1966] E.A. 306(u). —

⁴⁵ Uganda; Cap. 46.

⁴⁶ Uganda: THE INDEPENDENCE CONSTITUTION, art. 28(3) (c) (1962).

⁴⁷ Kenya: Stock and Produce Theft Act, c. 355, s. 15 (1) (c).

⁴⁸ *Muhuri v. Serebi Ole Hampei*, S.C. Kenya, Civ. 1021/64.

⁴⁹ 1961 All N.L.R. 458.

statement brought the government into discredit or ridicule, regardless of the truth or falsity of the statement, and without regard to the repercussions of the statement on public order. The Court held that the statute was constitutional, for it was justifiable in a democratic society to take reasonable precautions to preserve public order. They based their decision on the "dangerous tendency" test long since discarded in the United States.⁵⁰

Another example is *Ross-Spencer v. Master of the High Court*.⁵¹ A statute,⁵² remaining from colonial days, provided that the intestate estate of any unmarried person who himself or one of whose parents belonged to any of the "aboriginal races or tribes" of Africa south of the equator, would be administered and distributed by customary law. The Constitution contained the usual guarantee against discrimination, defined as a law

affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place or origins, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privileges or advantages which are not accorded to persons of another such description.⁵³

The court, in a challenge to the statute, sustained it in the face of the constitutional guarantee, resting its decision upon the derogation clause. That clause provided that discrimination shall be permitted which subjects persons of different descriptions to a disability or gives them an advantage "which, having regard to its nature or to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."⁵⁴ The court found that the discrimination at issue was "reasonably justified in a democratic society" under the conditions of Swaziland.

When, on the other hand, substantial property rights (as opposed to human rights) were at issue the discretion of the court was almost invariably exercised to protect the property right. In Nigeria, this occurred with respect to public taking of property.⁵⁵ In Kenya, cases concerning discrimination in trade and/or market-stall licensing against non-

⁵⁰ *Schenck v. United States*, 249 U.S. 47 (1919).

⁵¹ Swaziland: Civ. App. No. 1 of 1971, dated April 17, 1972; see Aguda, *Discriminatory Statutory Provisions and Fundamental Rights Provision, of the Constitutions of Botswana, Lesotho, and Swaziland*, 89 S.A.L.J. 299 (1973).

⁵² Swaziland: Administration of Estates Proclamation, c. 101 s. 2(3) of 1932 Act, now s.68.

⁵³ Swaziland: INDEPENDENCE CONSTITUTION, art. 15(3).

⁵⁴ *Id.*, art. 15(4).

⁵⁵ *Lakanmi v. Att'y Gen. (West Nigeria)* SC 58/59 of April 14, 1970.

citizen Asians have been decided in favor of the property rights of the targets of the discrimination.⁵⁶

The list is not long, because the number of constitutional cases has not been great. The pattern, however, seems clear. When the constitutional language plainly covers the case at hand, the constitution has been enforced. When there has been genuine scope for discretion, it has been exercised *against* the claim of freedom in political cases, and *for* the claim of property where substantial property rights have been at issue. Following are explanations for this emerging pattern of judicial decisions.

B. EXPLANATIONS

Current in the literature are three alternative explanations for judicial decision-making which we may denote the positivist model, the political science model, and the process (or realist) model. The first, the positivist model, is the familiar notion on which law students to this day cut their teeth. It suggests that "a judge decides his cases by the somewhat mechanical application of legal rules which he finds *established* in the legal system. They are, in this sense, *binding* on him completely apart from his own judgment as to their fitness for his purpose." This theory has an historical, if not a logical relationship with the dictates of an Austinian, positivist conception of law and a rigid notion of the division of power.⁵⁷ The model explains the decision by the general proposition that the law is a gapless web; the judge decides cases when the law is seemingly ambiguous or absent by reference to "higher order" principles that are in turn derived from the corpus of the law itself.⁵⁸ It explains the decisions in Africa concerning fundamental freedoms by the supposed existence of higher order principles which determine the result. It is a legalistic explanation.⁵⁹

In contrast, both the political science and the process models reject the proposition that it is possible for judges to decide cases involving matters about which the governing law is ambiguous by resort to the corpus of the law itself. The argument is so familiar that it will only be indicated.⁶⁰

Rules, like the words of which they are composed, have a core meaning and a penumbra. A murder statute imposes liability when the accused

⁵⁶ E.g., *Shah Vershi v. Transport Licensing Board*, [1970] E. A. 631.

⁵⁷ Weiler, *Two Models of Judicial Decision Making*, 46 CAN. BAR. REV. 406, 409 (1968).

⁵⁸ Trubeck, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 730-31.

⁵⁹ *Id.* at 736-39.

⁶⁰ W. CHAMBLISS AND R. SEIDMAN, *LAW, ORDER, AND POWER OF LAW*, 120 (1962); Seidman, *The Judicial Process Reconsidered in the Light of Role-Theory*, 32 MOD. L. REV. 516 (1969).

"caused" the death. Some factual situations are plainly covered by this rule. For example, suppose that the accused is found to have taken a gun which he knew was loaded, aimed it at the forehead of his most bitter enemy with the intention of killing him, and pulled the trigger, the bullet entering his enemy's head and killing him. Plainly, this would be a case of murder: the accused has "caused" the death of another with the requisite intention. It is a "clear case," falling within the core meaning. Suppose, however, he only injures the victim; and on the way to the hospital, the injured man is run down and killed by an automobile. Whether the accused "caused" the death is now debatable; the facts lie in the penumbra of the word "cause." As a case of first impression, reasonable men could differ over liability for the death. It is a "trouble" case.

Judges in trouble cases are therefore called upon to determine whether the statute or other rule in question includes or excludes the particular facts at hand. To do this, they must determine the precise content of the words at issue. There must be at least two possible constructions of the words, or else the case would not be a trouble case. The court, therefore, is required to choose between them. By doing so, the court is in effect legislating. It is determining not what the law is, but what it ought to be.

The question to be explained, in this view, is why judges make the choices they do. More specifically, why have judges in Africa almost always decided trouble cases concerning fundamental freedoms in favor of government? The answer cannot be found exclusively in the legal order. The search of the legal order produces only ambiguity and hence the requirement of choice.

To explain why judges choose as they do, the political science model follows the positivist notion of values. It assumes that values are like tastes.⁶¹ The explanation of the choices judges make lies in what sort of men they are—their "values." Glendon Schubert states that

one can understand and explain—at least, on a first level of initial apprehension—everything about judicial decision-making on the basis of attitudinal similarities and differences in the decision-making group. . . . Both legal norms and legal facts are viewed as functions of attitudes towards the public policy issues in a case. . . . Why do judges differ in their attitudes? Judges differ in their attitudes because they have come to accept some beliefs, and reject others, as the result of their life-experience. What a judge believes depends upon his religious and ethnic affiliations; his wife; his economic security and his social status; the kind of education he has received, both formally and informally, and the kind of legal

⁶¹ T. WELDON, *THE VOCABULARY OF POLITICS* (1965).

career he has followed before becoming a judge. His affiliations, marital and socio-economic status, education and career will in turn be largely influenced by where he was born, and to whom, and when. . . . There is still a third level of possible analysis. Why and how does it matter where a judge was born, and to whom and when? Why and how, in other words, are judicial attributes determined by cultural differences? . . . The analysis of cultural influences, in both primitive and complex political systems, is directed towards an attempt to understand and explain how and why different judges come to have different attributes.⁶²

This political science explanation is deeply disturbing to common lawyers. Our legal culture supposes that judicial decision-making is relatively free from subjective value-judgments by judges. Judges cannot legitimate their decisions as arbiters of conflict if they are perceived to be biased, and to be basing their decisions not on "the law" but, in the final analysis, upon the sort of men they are. Further, it is an explanation which fails to explain some of the data. It may be possible to explain the decisions of judges in cases where there is discretionary choice in terms of the judges' "values." Cases in which "conservative" judges affirm democratic freedoms cannot be thus explained.

Moreover, the political science explanation may explain in part why judges choose between alternatives as they do, where there is genuine room for choice. That choice, however, is not made in an institutional vacuum. It is made in the context of the most highly structured decision-making system in the whole panoply of government. An explanation that selects judicial "attitudes" as the significant variable will explain only why the choice is made among the alternatives thrown up by the process. It cannot explain the scope of choice itself or why the judges' values should play so critical a role.

For lawyers, those are the significant questions. Whatever our myths, lawyers have always known that the judges' prejudices ("values") influence a decision. Every practicing lawyer knows that divorce cases ought to be kept away from some devoutly Catholic judges; that some judges are more prosecution-oriented in criminal cases than others; that some are racists, and others not; and so forth. The problem is not to explain why particular judges have their crotchets. Rather, it is to explain why these attitudes have so large an influence in decision-making, despite the prevalent legal culture which denies that they should. Why are the available choices structured as they are? How can the prejudice of judges as a factor in decision-making be reduced to a minimum? The political science explanation of judicial behavior is too limited.

A third explanation considers the appellate courts as decision-making

⁶² JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH (Schubert ed. 1964).

systems. It identifies the norms which define inputs, conversion processes and feedback systems of appellate courts in Africa by the way in which they structure choice for judges, and the way in which they require judges to go about deciding cases. These norms also define the alternative potential rules of constitutional law between which judges must choose. The operative working rules of the system permit the widest scope for discretionary choice in constitutional cases and force judges to rely upon their personal attitudes and values in making such decisions. Finally, that the judges should decide as they have has been almost inevitable since the systems of selection and recruitment of appellate judges in Africa in the post-independence decade have ensured that judges would be appointed most likely to have conservative and authoritarian values and interests. The remainder of the article will be an examination of the factors operative in the decision-making systems.

C. APPELLATE COURTS AS DECISION-MAKING SYSTEMS

The ideal stipulated for the role of appellate judges, like other judges, is that their decisions should be predictable. They should rest on grounds that can be justified in terms generally acceptable, not upon the judges idiosyncratic "values" or ideologies. The political scientists have laboriously demonstrated what practicing lawyers have always known: that ideal is not achieved in trouble cases. Why do appellate courts not achieve that goal? The answer lies in the institutionalized processes of appellate court decision-making, and to find that answer, the inputs into the processes must first be defined.

1. *Inputs: The selection of issues for adjudication.* Courts cannot fulfil their function as watchdogs of constitutional processes unless cases come before them raising constitutional issues. Surprisingly, there are very few constitutional law cases in the African law reports. This results primarily from the limitations imposed by the adversary system.

Courts in Africa, as elsewhere in the common-law world, are dependent upon litigants to raise issues before them. They have no independent supervisory power, and until some litigant is moved to bring a case before them, they can do nothing about impairments to the fundamental freedoms or anything else. Constitutional law cases are invariably raised by private litigants. The government, of course, never attacks its own activity, and the constitutionally independent D.P.P.'s in Africa have never seen fit to do so.

The institution of private litigation to attack government activity on constitutional grounds is an expensive, sophisticated affair. It is not apt to happen unless the accused is wealthy enough to employ competent

counsel. In the United States, claims of violations of fundamental freedoms have typically been raised only when a defendant is either himself wealthy or is supported by some private association interested in the issue—the NAACP or the American Civil Liberties Union, for example. Such associations hardly exist in Africa. What cases have been litigated on constitutional grounds in Africa have been sometimes supported by opposition political parties. Dr. Chike Obi in Nigeria, whose case I have already discussed, for example, was the leader of a small splinter political party.⁶³

Permissible constructions of the constitution. In statutory and constitutional construction alike, the thundering command to lawyers, perhaps the most important of Hart's rules of recognition, the core of Dean Pound's "taught law," is that judges, where they can, *must* apply the law that is. Laws are written in words. When the competent speakers of the language could not disagree that a particular set of facts falls under the language of the governing rule, judges must apply the law as it is written. Such a case begins and ends with that resounding command.

Cases that have found in favor of a claim for freedom in Africa can be subsumed under this rubric. For example, the Nigerian constitution, as in all the African fundamental human rights provisions, contained a *nulla poena sine lege* provision: "No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefore is prescribed, in a written law."⁶⁴ There is no derogation clause. The Nigerian court had no difficulty in overthrowing a conviction for a crime based on unwritten customary law.⁶⁵

In *Ross-Spencer*,⁶⁶ the Swaziland case already mentioned, the statute based discriminatory treatment on ethnic origins. The constitution provided, in the derogation clause, that the prohibition against discriminatory treatment did not apply to any law, insofar as the alleged discrimination "was reasonably justifiable in a democratic society." The appellant in effect urged that the crucial provision should be construed as though it contained a further clause: "and no discrimination based on ethnic origin shall be deemed to be reasonably justifiable in a democratic society." The appellee claimed that the further clause should read, "and a discrimination based on ethnic origin shall be deemed to be reasonably justifiable in a democratic society, where the discrimination is in fact between classes or groups of people living under different social or eco-

⁶³ 1961 All N.L.R. 458.

⁶⁴ Nigeria: THE FEDERAL CONSTITUTION, art. 22(10) (1963).

⁶⁵ Aoko v. Fagbemi, 1961 All N.L.R. 400.

⁶⁶ Swaziland, *supra* note 46.

nomic systems." The vagueness of the constitutional provision opened wide the door to construction by the Court.

Faced with such latitude in construction, judges must nevertheless select a construction which is at least arguably within the meaning of the word in dispute. The relative vagueness or ambiguity of the provision at issue determines the scope for counsel and court to devise alternative constructions. A traffic ordinance making it an offense to drive "at an unreasonable speed" plainly permits much greater scope for discretion than one which makes it an offense to drive at a speed "in excess of 65 kilometers per hour." A constitutional provision flatly prohibiting slavery or involuntary servitude offers far less scope to judicial construction than one which prohibits discrimination unless "reasonably justifiable in a democratic society."

Rules of evidence. Sound decisions about matters of what the law ought to be can only be based upon notions about what is the case. The central perception of the American legal realists was that despite the formal, "logical" justifications of positivist judges, their decisions were in fact based upon notions of the consequence of the proposed rule on society.⁶⁷ That requires some information about society and the probable consequences of the rule at issue. The data admitted into the decision-making process control *pro tanto* the decisional output.

The kind of evidence demanded by the ordinary work of the trial courts is sharply limited to the question of whether a claimed set of historical events actually occurred. Did the defendant run down the plaintiff on the Great East Road at twelve-thirty on January 17th? Were the brakes of the defendant's car in good working order? Was he keeping a good lookout? Did the plaintiff suffer a fracture of the right tibia?

Long judicial experience has developed a set of rules reasonably well adapted to ensuring that only data related to these quite narrow historical questions can be considered by the trier of fact. Hearsay is excluded; opinion is excluded; anything not directly relevant to the precise facts alleged is excluded, and so forth.

In determining the question of what the law ought to be, however, these narrow evidential facts are not nearly so important as the kind of data that legislative committees ordinarily consider: statistics describing tendencies in the society, sociological and political analyses, and other "legislative facts." These legislative facts are very difficult to introduce as evidence in the trial court, for the rules of evidence in general forbid it. For example, how should survey data be entered when it is based

⁶⁷ O. HOLMES, THE COMMON LAW 1 (1881).

upon the hearsay statements of many informants and the enumerators employed by the researcher?

The political science model of the judicial process argues that this is irrelevant. Judges will make their decisions on the basis of their "attitudes," not on the basis of data. Those attitudes, however, operate in the light of the judge's perception of what the case involves. In *Ross-Spencer*, the court justified its decision that the statute at issue did not discriminate on racial grounds by defining Swaziland society:

The population of Swaziland comprises two classes of people, one living under a more sophisticated European system, with a fully developed concept of the individual ownership of property and the right to dispose of it after death; the other living under tribal customs, in which the basic system of property is that it belongs to the family and not to the individual members of the family and is not transmitted by will. . . . To this may be added that, unlike the urbanized parts of the population, the Swazis in tribal areas mainly live on the produce of their cattle and ploughing fields and their farming is not conducted on a cash basis but is subsistence farming. . . .

"The difference between these two systems is the basis of the differentiation contained in s.72 (now 68) of the Administration of Estates Proclamation."⁶⁸

The implicit assumption was that these two classes of people are defined by their race; and therefore the discrimination based on race in the statute at issue was justifiable.

In fact, of course, whatever may have been the case in the past, this vision of race as the crucial dividing line between the two classes defined by the court is untrue today. There are Swazis who have university educations, who fill roles as ministers, permanent secretaries, lawyers and doctors and teachers and university lecturers.

But the rules of evidence make it difficult to bring data of this sort before the court. Absent legislative facts, courts will draw upon their acculturated perceptions of the world—their domain assumptions—as the data upon which to base decisions. If the rules of evidence exclude proof of the data that judges need to make sound judgments, inevitably they fall back upon their "values."

Constitutional litigation in the United States has faced this problem. Lawyers and judges have devised a few rather awkward devices to supply the court with the necessary social and economic data. The most used is the so-called "Brandeis Brief," an appendix submitted to the appellate court summarizing social data about the matters in issue contained in the

⁶⁸ Swaziland, *supra* note 46.

literature.⁶⁹ No such device has been institutionalized or even attempted in Africa.

Personnel. The last input function to be discussed concerns the recruitment and socialization of the appellate judges of Africa. To become a judge in the Colonial Service required that one be a member of the bar of either the United Kingdom or of Ireland. In fact, judicial appointment required some service as a member of the legal staff of the colonial administration.

These requirements were substantially continued in the independence constitutions. To be a Justice of Appeal or a High Court justice in Zambia, for example, the appointee had either (a) to have held high judicial office, or (b) to have been entitled to practice as advocate or solicitor for not less than seven years in a court of unlimited jurisdiction of some part of the Commonwealth or in the Irish Republic; or (c) to have been entitled to practice as solicitor in such a court, and to have held the office of Senior Resident Magistrate, Resident Magistrate, D.P.P., Senior State Advocate or State Advocate for a total of not less than seven years.⁷⁰ (These rules were made somewhat less stringent in 1969; three Zambians have been appointed since). At independence, no Africans in East and Central Africa were eligible by these standards for appointment to either the High Court or the Court of Appeal of any country. In West Africa, there were a few, but they too had been socialized into the colonial legal systems. Consider, for example, three of the serving judges of the East African Court of Appeals in 1970.

Sir Charles Newbold, the President, was born in New York of British parents, educated in Barbados, and at Oxford and Gray's Inn. He had served as Legal Secretary for the East African High Court; had been a justice and Vice President of the Court of Appeal and a member of the Legislative Assembly of Kenya for thirteen years immediately prior to independence and through the Mau-Mau period. Mr. Justice Eric J. E. Law was born in Burma, educated at Wrekin College, at Cambridge and the Middle Temple. He had been Crown Counsel in Nyasaland, Resident Magistrate in Tanganyika, a judge in Zanzibar, and a judge in Tanganyika before promotion to the Court of Appeal in 1965. Mr. Justice John Farley Spry was educated at Perse School Cambridge, and at Cambridge University. He had been Assistant Registrar of Titles and Conveyances in Uganda, Chief Inspector of Land Registration in Pales-

⁶⁹ See generally C. AUERBACH, L. GARRISON, J. HURST, and S. MERMIN, *THE LEGAL PROCESS* 99-130 (1961); Vose, *The National Consumer's Council and the Brandeis Brief*, 1 *MIDWEST J. OF POL. SCI.* 267 (1957); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 *HARV. L. REV.* 1281 (1952).

⁷⁰ Zambia: *THE INDEPENDENCE CONSTITUTION*, art. 99 C.

tine; Registrar General of Tanganyika, of Kenya, and again of Tanganyika; a member of the Legal Service Commission of Tanganyika; Principal Secretary of the Public Service Commission; and a Puisne Judge of the High Court of Tanganyika before elevation to the Court of Appeal. Between them, these three judges alone had 64 years of service in the colonial administration before independence.⁷¹

The Colonial judicial officers tended to come from the same class and social backgrounds as Colonial Service officers generally: "good" family, public school, Oxbridge. That they would tend to find the authoritarian ideologies of the Colonial Service congenial was, perhaps, to be expected. It is obviously unreliable to predict from the antecedents of a particular individual his probable world-view or ideology. (Friedrich Engels, the co-founder of Marxism and a passionate socialist, was a prosperous Birmingham manufacturer who rode to the hounds regularly on Thursdays.) But the political science model is demonstrably right when viewing members of a social group or class as a whole: the central tendency of a class will be towards an ideology consistent with its interests. The values of persons deeply socialized into a particular bureaucracy will tend to accord with that bureaucracy's deepest convictions.

The ideology of judges socialized into the Colonial Service and the Colonial Judicial Service was apt to be consonant with the authoritarian ideals of the Colonial Services. The notion of support for the government of the day was too deeply engrained in that Service for colonial judges readily to admit of its very opposite.

The judges who occupied the appellate benches of Africa were in the main educated in England, and admitted to the Bar there. (In the former High Commission Territories—Botswana, Lesotho and Swaziland—they were educated mainly in South Africa, and had prior judicial experience there. Many have been actually seconded from the South African bench directly to these three countries. A few judges have a British West Indian background).

That education was dominated by the ideologies of analytical positivism. In the universities of England, so late as the 1950's:

Legal philosophy continued to be concerned primarily with the linguistic problems involved in the analysis of doctrinal issues; books about precedent and evidence still tended to be collections of rules about precedent and evidence. The same was true for statutory interpretation. There was little attempt to discover the fundamental bases of precedent, evidence or statutory interpretation or the role they played in the legal process. . . . International law was still generally taught independently

⁷¹ WHO'S WHO IN KENYA, 1963-65 (n.d.); Kenya: 1966 *Staff List* (Nairobi: Government Printer, 1966).

from international relations and diplomatic history. Constitutional law was still divorced from politics and political science; and administrative lawyers still regarded themselves as having little concern with the problems of the civil service or public administration. Meanwhile, in widely studied subjects like tort and contract, there was still remarkably little research in practical problems—whether it was scope of arbitration, the development of commercial practices, the growth of contract outside the courts, or the impact of insurance on the law of torts.⁷²

A visiting American academic has been quoted as saying that in England, "the majority of law teachers appear not to regard it as their task to go outside the traditional doctrinal framework used by English judges in rationalizing their decisions."⁷³ Judges whose legal education was limited to the Inns of Court had, if anything, even a narrower training, thus ensuring legalistic law-finding.

In addition to their educational backgrounds, the interests of the judges affect the decision-making process. The somewhat idealistic theory underlying the institutions of the independent judiciary is that this independence insulates the judges from pressure arising from the hope of personal rewards or fear of penalties. Judicial independence ordinarily reaches its maximum effectiveness with members of the highest appellate court, who have reached the pinnacle of their careers. Trial judges, however, live always in hope of appointment to a higher bench, and insofar as appointment rests with political authorities, no doubt there are pressures operating upon them at least in political cases. Even appellate judges, however, must live in a social milieu. They have their own reference groups, whose reactions inevitably must have some effect upon their decision-making.

Robert Martin puts it sharply enough:

We must also ask whether the whole concept of the independent judiciary is illusory. Judges are members of the ruling class by birth or assimilation (regardless of what that class may be) and hired employees of the State who depend ultimately on the coercive power of the executive for the enforcement of their decisions. To disregard these conditions in an attempt to be totally independent would be meaningless.⁷⁴

The judges of Africa are plainly part of the political elite. Their interests are tied to the status quo.

That at independence most of the higher court judges were expatriate created special pressures. It was part of the conventional wisdom

⁷² B. ABEL-SMITH and R. STEVENS, *LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM: 1750-1965* 372 (1967).

⁷³ Quoted in *id.* at 368.

⁷⁴ R. MARTIN, *PERSONAL FREEDOM AND THE LAW: A STUDY OF SOCIALIST STATE ADMINISTRATION* 55 (1974).

of the Colonial Service that expatriate officers were more independent of particularist pressures than African officers.⁷⁵ Free from the claims of family and village, the expatriate officer, it was believed, perceived his interest to be in advancement within the Service and an eventual honorable retirement in England. He would, therefore, be likely to bring to decision-making the impersonal standards which the Service purported to uphold.

Whatever the case before independence, as applied to administrative officers, expatriate judges after independence had particular disabilities, making it more likely than less that they would decide cases with a wary eye on the political winds. The judiciary as a whole depends for its ultimate support upon the goodwill with which it is regarded. It is the most fragile branch of government. It lacks a constituency that perceives itself as represented by it, and it lacks guns in default of legitimacy.

Expatriate judges in Africa were well aware of the tenuousness not only of their tenure, but of the whole structure of judicial power. A member of the East African Court of Appeals, when taxed with the legalistic quality of that court's opinions, has said that to address openly the policy questions which were at issue would lead to the withdrawal of politically sensitive cases from the court of jurisdiction.⁷⁶ African governments would not likely tolerate expatriate judges seeking to use judicial power to overthrow governmental decisions on matters perceived by government as touching upon its power to govern.

2. *Conversion Processes.* Precious little is known about how judges in fact come to their decisions. A great deal is known about the justifications they give for them, for appellate judges typically write opinions, purporting to justify their decisions. I examine here: (a) the relationship between opinions, justification, and decision-making; and (b) the sorts of justifications given for African decisions.

Opinions, Justifications, Decision-making. Courts write opinions mainly for other judges and lawyers to read. They purport to give reasons which the deciding judge believes will persuade his professional peers that the decision matches the appropriate rules for justification. Obviously, opinions do not disclose the process by which the judge reached his decision. What counts is that they follow the appropriate rules for justification. A judge in the common law tradition who tried to justify his decision by blatantly emotional appeals to prejudice or politics

⁷⁵ J. MACKINTOSH, *NIGERIAN GOVERNMENT AND POLITICS* 28, 42, 54 (1966).

⁷⁶ In conversation with the author, December 1969 in Dar es Salaam.

would not receive the esteem of his fellow professionals. They have been socialized to adhere to different standards.⁷⁷

To justify a decision is to control the decision-making process *pro tanto*. A judge must be a fool to come to a decision which he is incapable of justifying pursuant to the rules of justification. Opinions, by requiring the judge to justify his conclusion, at the same time impose constraints on the process of decision-making. They define the conversion processes of appellate courts.

Opinion Styles in Africa. The principal goal set for the judge as arbiter is that his own personal values should enter as little as possible into the decision. The prescribed system of justification, under which the judge must write his opinions, will help determine the extent to which that ideal is achieved.

In the United States, three periods of opinion-writing can be distinguished. The first, labelled by Karl Llewellyn as the Grand Style, came to an end in the latter half of the nineteenth century. Faced by a case of first impression, judges justified their decision by frank appeals to policy. In the celebrated case of *Priestley v. Fowler*,⁷⁸ Lord Abinger said, "It is admitted that there is no precedent for the present action. . . . We are therefore to decide the question upon general principles, and in so doing we are at liberty to look at the consequences of a decision the one way or the other."

This candid justification in terms of social consequences disappeared in the English and American opinions of the later nineteenth century. It was replaced by the Formal Style. Based jurisprudentially upon analytical positivism, these opinions presume that the law is a "gapless web." Seeming ambiguities and incoherencies can be resolved through the use of reason alone, operating with materials drawn only from the legal order itself—cases and statutes. The Formal Style reflected all the forces seeking to make the legal order match the Weberian ideal.

The history of opinion styles in Africa follows the same pattern as the common law generally.⁷⁹ We examine specifically opinion styles in East Africa. Two periods in the style of these opinions may be defined. The first lasted until well into the decade of the 1920's, and with respect to procedural matters, even for some time after that. In this period, opinions tended to be terse; they rarely cited extensive authority; a high proportion of the cases were really "clear case" matters, in which the appellate court was merely correcting an obvious error by the local magis-

⁷⁷ CHAMBLISS and SEIDMAN, *supra* note 55, at 118.

⁷⁸ 3 Mees. & Wels. 1 (Exchequer, 1837).

⁷⁹ Seidman, *The Style of Appellate Opinions in East Africa: A Comment*, 3 E.A.L. REV. 189-201 (1970).

trate. When there were disputed issues of law, however, the court validated their opinions almost exclusively in the Formal Style.

For example, in *Re a Reference*⁸⁰ there was at issue the admissibility into evidence of an unstamped promissory note, which required the court to construe ambiguous language both in section 35 of the Indian Stamp Act, and in the order of the Secretary of State applying that Act to East Africa. Eleven years before, in 1904, Judge Hamilton had examined the problem in an earlier case and had decided in favor of admissibility. In that case, he had only said that "any instrument to which the first provision of section 35 applies may be admitted into evidence on payment of the duty with or without penalty as the Court thinks fit in the circumstances of the case."⁸¹ No argument was made to justify the decision. Again, in 1915, the same judge was faced with the same question. He now came to precisely the opposite answer: "Now, it is clear that the first provision to section 35 does not apply to promissory notes, for a promissory note is expressly made an exception to the proviso. The law on this point appears, I regret to say, to have been incorrectly stated by myself so far back as 1904. . . ."⁸²

It is obvious that if anything was clear, it was that the law on the point was *not* clear. Yet Judge Hamilton did not justify either his earlier decision, or its reversal.

The reason for this extraordinary want of reasons for decisions probably reflects two confluent factors. The first was merely practical. Adequate reference books to the English law were simply missing in East Africa. Case after case was decided on the basis not of the original report of precedents, but a brief quote or footnote reference in a textbook. The second arose from the fact that the lower courts in East Africa were manned not by trained judges, socialized into the legal profession, but laymen working in the dual capacity of magistrate and District Officer. They would not question the decision of appellate courts with their trained judges. The early opinions were brief because they needed only to announce the law, not to persuade the profession of their correctness.

One can hypothesize that the increased sophistication of the opinions reflects the changing composition of the judiciary and of the legal profession. There were more lawyers. Resident Magistrates tended to be legally qualified. Better libraries were available. The brief opinions that had accompanied earlier decisions no longer would do. The judges

⁸⁰ 6 E. Afr. L.R. 45 (1915).

⁸¹ *Kanji v. Admin. Perez Din*, 1 E. Afr. L.R. 61 (1904).

⁸² 6 E. Afr. L.R. 45.

adopted the system of formal justification in which they had been trained in England.

In the United States, but not in England, a third period of opinion writing, the Realist period, increasingly represents the dominant trend. In the Realist period, the earlier Grand Style has been resurrected. Judges, influenced by American legal realism, increasingly write their opinions frankly addressing the policy issues. The celebrated Supreme Court judgment in the desegregation cases⁸³ is an example.

Emergent independence in Africa has created a new situation there. Sir Charles Newbold has written that a "blind adherence" to precedent when circumstances have changed "and the needs of the community are vastly different" can do a considerable amount of harm to the community which is not compensated by any certainty in the law. "When a precedent has outlived its usefulness, [it is better] to say so and the community [will] have the benefit of a clear-cut change in principle, of a decision based on modern requirements or based on a sounder logic. . . ."⁸⁴ To determine whether a precedent meets "modern requirements" of course requires a justification in terms of the social consequences of the proposed new rule, not merely a justification in terms of precedent and statute.

The new situation therefore demands a return to Grand Style decisions. In a period of rapid social, political and economic change, in which every African state is consciously seeking to guide its economic and political destinies according to the guiding perspectives of its government, what is required is what Weber called substantively rational law-making, rather than legalism. Planned development requires that the rules adopted consciously follow articulated general principles, and that their anticipated consequences accomplish those principles. The justification of opinions can only match the imperatives of modern Africa when they meet these requirements. They will match them only when the bench and bar in Africa have come to accept the legitimacy of Grand Style justifications.

By the same token, to rely upon the Formal Style makes the social utility of decisions apt to be a matter of chance, not conscious choice. As I have suggested, the opinion not only validates the decision in the eyes of other judges and lawyers, it is also a test for the deciding judge that his decision can be justified. The Formal Style, based as it is on the fundamental fallacy that the law is a gapless web, and that even trouble cases do not require a policy-choice by judges, inevitably balances opinions on what Holmes called an inarticulate premise. To fail to articulate

⁸³ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁸⁴ Sir C. Newbold, *The Values of Precedents arising from Cases decided in East Africa as Compared with those Decided in England*, 2 E.A.L. REV. 1, 9 (1969).

premises is to ensure that the personal predilections of the judge will have full sway *sub silentio*.

The more ambiguous the rule to be construed, the wider the scope for policy choice. Constitutional norms are the most ambiguous in all the law. To rely upon the Formal Style in justifying constitutional decisions gives the widest play for the personal "values" or biases of the judge. It makes it impossible for the judge to fulfill the role-expectation of rationality in decision-making, despite the cloud of chop-logic with which Formal Style opinions are invariably clothed.

The Style of Justification in Constitutional Cases. The essence of the Formal Style of justification was set out by the principal technical advisor, an Irish solicitor, to the Ghanaian authorities in drafting the 1960 Republican Constitution. He wrote that the "formal principles governing Ghana's republican constitution" were:

1. It is a mechanism, and all its operative provisions are intended to have the precise effect indicated by the words used—no more and no less.
2. It is drafted on the assumption that the words used have a fixed and definite meaning and not a shifting or uncertain meaning; that they mean what they say and not what people would like them to mean; and that if they prove unsuitable they will be altered formally by Parliament and not twisted into new meaning by 'interpretation'.
3. It leaves no powers unallocated; those not reserved to the people are exercisable by the authorities established by it.
4. In its original form, or as for the time being expressly amended, it overrides any inconsistent law whenever made.
5. It assumes that legitimate inferences will be drawn by the reader, but that he will not transgress the rules of logic—as by drawing an inference from one provision which is inconsistent with the express words of another provision.
6. It needs to be read as a whole and with care.⁸⁵

Commenting upon these "principles," S. O. Gyandeh has summarized their impact. Together, they hold

(i) That the provisions of the Constitution have a determinate meaning for all time, and that this determinate meaning is discoverable from the plain or ordinary meaning of the words used.

(ii) When faced with the task of applying any provision of the Constitution to a given situation, the decision-maker is precluded from any creative activity. He is merely to lay the given situation alongside the relevant provision invoked, and it should be clear to him whether the provision is applicable to the situation or not.⁸⁶

⁸⁵ F. BENNION, *CONSTITUTIONAL LAW OF GHANA* 111 (1962).

⁸⁶ S. Gyandeh, *Principles of Judicial Interpretation of the Republican Constitution of Ghana*, 3 UNIV. OF GHANA L.J. 38 (1968).

A Kenyan judge quoted an Indian case⁸⁷ with approval to the same effect; "An argument founded on what is claimed to be the spirit of the Constitution is always attractive, for it has a powerful appeal to sentiment and emotion; but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view."⁸⁸ These rules summarize, in short, the Formal Style of justification.

That style has its own virtue. In clear cases, where reasonable men could not dispute the meaning of words, the Formal Style requires that judges enforce the law as it plainly reads. Since the judge has no choice in such cases, he must subordinate his own predilections, prejudices, and biases to the statute or constitution.

The difficulty with the Formal Style arises when courts are faced with cases where there might be a genuine disagreement about the meaning of the constitutional or statutory language involved. As Bennion's statement makes clear, the Formal Style assumes that words have one, and only one, meaning, in all times and places, and that their boundaries are always sharp. That assumption, plainly untrue, tends to become a blinder upon the search for ambiguity. Insensitive to the potential for ambiguity, courts too often decide cases as if there were one and only one meaning for the language at issue, when in truth the words are ambiguous.

A few examples may be adduced. In the Kenyan case just mentioned the testimony of the accused had been taken compulsorily under the Exchange Control Ordinance. He was then prosecuted, and his own earlier testimony used to convict, pursuant to a provision of the Exchange Control Ordinance. He appealed on the ground that that provision was unconstitutional under the self-incrimination provision of the Kenyan Constitution that "No person who is tried for a criminal offense shall be compelled to give evidence at his trial." His claim was denied. The plain meaning of the constitutional provision only prohibits compelling the accused to give testimony *at his trial*. What compulsion was used against the accused took place at the Exchange Control hearings. That the phrase "at his trial" was ambiguous under the circumstances—the word "trial" might have been held to include the proceedings in which the evidence was compulsorily taken as well as the courtroom proceedings—was never mentioned by the court. In consequence, the court made a far-reaching policy decision seemingly without being aware that it was

⁸⁷ *Kashawa Menon v. State of Bombay*, 1951 S.C.R. 228.

⁸⁸ *Republic v. El Mann*, 1969 E.A. 357, 360 (High Court, Kenya).

doing so, and hence without taking into account the sorts of considerations that are appropriate to the determination of policy.

*Re Akoto*⁸⁹ is a second example of the disastrous consequences of Formal Style justifications in constitutional trouble cases. That case challenged the constitutionality of Ghana's Preventive Detention Act, relying in part upon a Declaration of Principles set forth in Article 13 of the Constitution. That Article required the President upon assumption of office to declare his adherence to the following propositions, among others:

That freedom and justice should be honored and maintained . . . That no person should suffer discrimination on grounds of . . . political belief.

That subject to such restrictions as may be necessary for preserving public order, morality or health, no person shall be deprived of freedom of religion, of speech, of the right to move and assemble without hindrance or of the right of access to courts of law.⁹⁰

The petitioner, a political opponent of the President, was detained without hearing or trial under the enabling statute. The question to be decided was whether the Preventive Detention Act was unconstitutional under the terms of Article 13.

The Court denied the petition. The Chief Justice, in his opinion, justified the decision in large part on the narrowest of linguistic grounds:

It will be observed that Article 13(1) is in the form of a personal declaration by the President and is in no way part of the general law of Ghana. In the other parts of the Constitution where a duty is imposed the word 'shall' is used but throughout the declaration the word used is 'should'. In our view the declaration merely represents the goal which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts.⁹¹

The Court therefore came to the rather surprising conclusion that Article 13 did not form part of the law of Ghana. The Court blinded itself to alternative possible solutions—for example, to create out of Article 13 a presumption that the President would not violate his oath. Using that presumption at least to read into the Preventive Detention Act a violation of that oath would have required no greater strain on its language than occurs whenever a court reads a *mens rea* requirement into a criminal statute that on its face imposes liability without fault.

No place has the Formal Style opinion demonstrated its vacuity so clearly as with respect to attempts to construe the syballine phrase, "reasonably justifiable in a democratic society." In *Patel v. Attorney-*

⁸⁹ 1961 GHANA L. R. 523.

⁹⁰ Ghana: THE REPUBLICAN CONSTITUTION, art. 13 (1960).

⁹¹ 1961 GHANA L.R. 523, 535.

General,⁹² regulation 35 of the Exchange Control Regulations of 1965 was attacked as violative of article 19 of the Zambian Constitution. The regulation empowers any authorized officer who reasonably suspects that any postal article contains contraband under the Exchange Control Regulations to seize it without warrant. An officer seized some packets belonging to the accused. The packets contained Zambian currency being illegally exported. Objection was made to their admissibility, on the ground of the constitutional prohibition against unlawful searches and seizures. That constitutional provision contained the usual derogation clause. The main issue was the meaning of the words "reasonably justifiable in a democratic society."

Plainly, these words require a judge to make policy determination; What scope for freedom from search and seizure is required by a "democratic" society? The critical word is so vague that the judge must define it; and, by defining it, give it content. In *Patel*, the judge first quoted with obvious disapproval Humpty Dumpty's famous words in *Through the Looking Glass*: "When I use a word, . . . it means just what I choose it to mean—neither more or less." He then went to the *Oxford English Dictionary* to define the word "democracy," emerging with the not very helpful definition that it means "government by the people." He cited two American and one Indian case emphasizing that a free government implies broad privileges of free speech and press, but added that "all this is, however, subject to the security of the state (see *American Communications v. Douds*, 340 U.S. 268 (1951)), so that some degree of control is permissible in the interests of security but only so far as is reasonably necessary for that purpose." He cited *Entick v. Carrington*⁹³ for the proposition that general search warrants were not consistent with a democratic society, and thus reasoned that a warrantless search must also be invalid. He then referred to the American cases "which indicated a fundamental difference between the search of premises and the search of a motorcar, ship or vehicle and between a search for ordinary criminal purposes and a search for contraband." He then accepted the analogy between a moving vehicle and articles in the post, which are also in transit. On this basis, he held regulation 35 "justifiable in a democratic society."

Obviously, an equally "logical" argument could have been constructed to come to the opposite conclusion. Why the judge came to the one conclusion and not the other cannot be found in the decision, despite its great length. The Formal system of decision-making maximized the space within which the judge's personal "values" could roam.

⁹² Selected Judgments, Zambia, No. 33 of 1968, 111.

⁹³ 19 St. Tr. 1030 (1765).

In summary, decisions in African constitutional cases may best be explained on the basis of the following salient features of the decision-making system. First, because the raising of constitutional cases depends upon the initiative of private litigants or of the D.P.P., and because that initiative has been lacking, there has been a remarkable paucity of constitutional cases. Second, the derogation clauses of the fundamental freedoms provisions are so ambiguous as to permit almost any law to be held either constitutional or unconstitutional under them. Third, the legalistic Formal Style system of justification prevents the courts from openly addressing unresolved policy issues and forces them to make choices based upon their acculturated, unexamined "values." Further, the rules of evidence preclude presentation of "legislative facts" requisite to considered policy-making. Finally their constitutional decisions reflect the decision-making system: in clear cases judges adhere to the literal language of the constitution; in cases where there is room for discretionary choice they are controlled by their acculturated value sets and find against the claim for freedom in cases concerning civil and political liberties, and in favor of claims of protection of individual property rights. The analogy to the Supreme Court of the United States during the period prior to the great Court revolution of 1937 could not be more clear.

CONCLUSION

One idea embodied in the constitutional arrangements of the independent African countries was that the courts should stand as "sentinels of freedom."⁹⁴ It was an idea doomed to failure. It was not destined to failure (as is frequently assumed) because of denials of notions of formal judicial independence, or because African politicians have otherwise perverted the judicial process. Rather, it was doomed because of the structure of appellate courts as institutions in the African milieu. The Formal Style of justification for opinions permitted maximum play for the judges' unexpressed "values" or domain assumptions. The method of controlling inputs guaranteed that the judges would not be presented with data which might challenge those assumptions. The systems of recruiting and socializing judges ensured that they would be drawn from strata and groups who would tend to approve restrictions upon political freedoms in favor of government "stability." At the same time, the norms of appellate decision-making ensured that where the pertinent language was unambiguous, the courts would decide clear cases in accordance with unambiguous constitutional meaning. The constitutional language

⁹⁴ Grove, *The Sentinels of Liberty?—The Nigerian Judiciary and Fundamental Rights*, 7 J. AFR. LAW No. 3, 152-71 (1963).

with respect to the fundamental freedoms, however, was in most cases so broad and ambiguous that the judges' domain assumptions, usually unarticulated, had unbounded arenas within which to roam. In any event, African appellate courts have been singularly ineffective sentinels to protect the freedoms that purported to underlay African political systems.